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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re MORGAN S. et al., Persons Coming  
Under the Juvenile Court Law.

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LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MICHAEL S.,

Defendant and Appellant.

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B214141 consolidated w/B214240

(Los Angeles County  
Super. Ct. Nos. CK61240 & CK75609)

APPEAL from orders of the Superior Court of Los Angeles County,  
Jan G. Levine, Judge. Affirmed.

Niccol Kording, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County  
Counsel, and Timothy M. O’Crowley, Deputy County Counsel, for Plaintiff and  
Respondent.

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Michael S. (father) appeals jurisdictional findings and dispositional orders entered in juvenile dependency court with respect to his three children. Father contends there was insufficient evidence to support the dependency allegations that were based on father's conduct.<sup>1</sup> Father also contends removal of the children from his care was improper and the juvenile court erroneously failed to find father to be a non-custodial, non-offending parent.

Father's claims fail. The evidence supports the juvenile court's jurisdictional findings that rendered father an offending parent and the removal and disposition orders were well within the juvenile court's discretion. According, we affirm.

### **FACTS AND PROCEDURAL BACKGROUND**

#### *1. The 2005 dependency proceedings.*

In October of 2005, two of father's children, Morgan and Cassidy, were detained by the Department of Children and Family Services (the Department) after Cassidy was born with a positive toxicology screen for amphetamine and marijuana. A dependency petition alleged father had a history of substance abuse and is a current abuser of Vicodin and alcohol which renders him incapable of providing regular care to the children. The petition also alleged father failed to protect Cassidy from mother's (Sandra) drug abuse during her pregnancy with Cassidy.

In social reports father claimed no knowledge of drug abuse by Sandra during her pregnancy. Father stated he took Vicodin for six or eight months following a back injury at work but stopped taking it after he entered a residential detoxification program in August of 2005. Father admitted he drank alcohol occasionally but claimed he was

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<sup>1</sup> Father concedes the court has jurisdiction over the children based on its findings as to their mothers. (See *In re Alysha S.* (1996) 51 Cal.App.4th 393, 397.) However, father argues he may attack the counts sustained based on father's conduct because they prejudice his ability to assume custody of the children as a non-offending parent and might cause him other prejudice in the future. (See *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548.) We agree and address the merits of father's claims.

attending AA meetings and had been sober for 60 days. However, on separate occasions in October of 2005, a social worker and a nurse smelled alcohol on father.

After mother completed drug counseling, the children were released to her. Before the juvenile court terminated jurisdiction, father's therapist reported father did not need further therapy, he has been testing clean and was "actually a very good parent."

*2. The March 2008 voluntary family maintenance contract.*

The family again came to the attention of the Department in March of 2008, when it was reported the children were living with Sandra at her dog grooming parlor. Cassidy had been bitten on the face by dogs on two occasions, there was no kitchen or bathing facility and the place was inappropriate for the residence of children. Based on these allegations, a voluntary family maintenance case was opened.

The initial case plan indicated Sandra and father were in the process of dissolution and Sandra had been living at her dog grooming parlor for three months. The report noted father was arrested after an incident of domestic violence on January 1, 2008.

When father was interviewed at his home, he emitted a strong odor of alcohol. The Department learned that on March 8, 2008, father was scheduled to drive the children but father's friend would not permit father to use his vehicle because father had been drinking. The notes of a team decision making meeting on April 2, 2008, indicated father attended family court with alcohol on his breath.

Sandra and father agreed to a six month voluntary maintenance program. Father agreed to drug test and not to drive the children if he had been drinking.

*3. K. is detained after being born drug exposed.*

In December of 2008, father's girlfriend, Cynthia, gave birth to K. The Department filed a dependency petition which alleged K. was a dependent child under Welfare and Institutions Code section 300, subdivision (b), because she was born drug exposed and premature.<sup>2</sup> Cynthia tested positive for methadone and cocaine at the time

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<sup>2</sup> Subsequent unspecified statutory references are to the Welfare and Institutions Code.

of K.'s birth. K. was not eating on her own and required morphine every six hours. Cynthia admitted a history of heroin abuse commencing in her teenage years. Cynthia was in a methadone program and her methadone dosage was reduced from 80 milligrams to 50 milligrams due to her pregnancy. Cynthia denied the use of cocaine. Cynthia tested positive for heroin as well as methadone on October 15, and November 7, 2008.

At a team decision making meeting, Cynthia stated father was aware of Cynthia's drug abuse during her pregnancy and he did not stop her or tell her to quit.

Father told a social worker he was willing to reunify with K. "since he has done this before." Cynthia indicated she resided with maternal grandmother during her pregnancy. Father stated he knew Cynthia was in a methadone program but was not aware she was using other drugs and could not explain her positive test for cocaine at the time of K.'s birth.

K. was discharged from the hospital in mid-December of 2008. She required placement in a specialized foster home and doctor's appointments every three to five days to monitor her symptoms of drug withdrawal. The report indicated Cynthia was residing with maternal grandmother, who indicated willingness to adopt K. if reunification failed.

A last-minute information form filed January 13, 2009, indicated K.'s foster mother reported that, when Cynthia visited on January 2, 2009, father "popped his head through the front door and foster mother stated he smelled of alcohol." On January 3, 2009, father waited in the car while Cynthia visited K. for 20 minutes. Father has not visited K. Foster mother reported K. is experiencing withdrawal symptoms and needs to be swaddled constantly.

#### *4. Detention of Morgan and Cassidy.*

Concurrent with K.'s dependency proceeding, the Department initiated a new case involving Morgan and Cassidy. K.'s case was transferred to the department in which Morgan and Cassidy's case was pending and the cases thereafter were treated as related proceedings.

On December 11, 2008, a social worker and two police officers went to Sandra's dog grooming parlor. Cassidy was asleep in the front room on a dirty dog bed. Sandra's male companion, Ryan C., was present and appeared to be intoxicated. Morgan stated he has not seen father "for months as [father] is not getting better and is using a lot of drugs." Sandra stated father was a current abuser of alcohol and heroin.

A dependency petition alleged Morgan, age seven years, and Cassidy, age three years, were dependent children under section 300, subdivisions (a), (b) and (j). As relevant to this appeal, the petition alleged the children were exposed to violent physical altercations between mother and father, mother and father had a history of drug and alcohol abuse and mother's home was in a filthy, unhealthy and unsanitary condition. The children were detained and placed in foster care.

The detention report indicated father failed to drug test as he had agreed in the voluntary family maintenance plan, despite requests. Further, father did not avail himself of drug treatment, he continues to drink and abuse drugs and he denies drug and alcohol use. The report indicated residential services appeared warranted for father at this time.

An information for court officer form regarding an incident of domestic violence on January 1, 2008, indicated Sandra stated father pushed her, causing a five-inch scrape to her arm, then took the children but returned with the police to have her arrested. However, after the police questioned Morgan, father was arrested. Mother indicated Morgan did not wish to see father because he has made many promises he has not kept. Father last saw the children on July 4, 2008. Mother stated father and his new girlfriend, Cynthia, "bounce from one place to the next and neither are working." Mother indicated father is unstable and cannot supervise children.

Paternal aunt stated father is unable to care for or supervise children. Father has had a substance abuse problem and has been an alcoholic for years. Father was sober for about a year after he participated in drug rehabilitation but he returned to alcohol abuse. Paternal aunt indicated father and Cynthia stayed with paternal aunt in October or November of 2008 and drank her entire collection of numerous bottles of expensive wine she had received from clients of her business over the years. Paternal aunt indicated that “in two days it was all gone.” Paternal aunt stated alcohol and drugs were more important to father than the children. “He need[s] to be in a program. He sleeps and drinks all day, pretty much.”

Father failed to appear for a drug test on January 30, 2009.

*5. The jurisdictional findings.*

*a. Morgan and Cassidy.*

On February 17, 2009, Sandra submitted to the jurisdiction of the juvenile court. Counsel indicated that, with respect to father’s portion of the case, they would do a “paper trial.” The juvenile court received the social reports into evidence and found counts (b)(2), (b)(4), (b)(6) and (b)(7) true and sustained (b)(5) as amended. Count (b)(2) alleged Sandra’s history of and current abuse of methamphetamine and alcohol; count (b)(4) alleged detrimental home environment caused by alcohol abuse by Ryan C.; count (b)(5) alleged father’s domestic violence toward mother in the presence of the children; count (b)(6) alleged domestic violence between Sandra and Ryan C.; count (b)(7) alleged Sandra maintained an unsanitary home. Count (b)(3), which was dismissed, alleged father had a history of substance abuse.

The juvenile court declared the children dependents and ordered them suitably placed. The juvenile court ordered father to attend parent education, individual counseling to address case issues and to provide six random and consecutive drug tests. If father missed a test or tested dirty, he would be required to attend a drug rehabilitation program. After the juvenile court advised father of these orders, father responded, “Okay.”

b. K.

That same date, Cynthia submitted to the jurisdiction of the juvenile court and father again agreed to a “paper trial.” The juvenile court received the social reports into evidence and thereafter sustained the allegations of count (b)(1) which alleged Cynthia used drugs including methadone during her pregnancy and had a positive toxicological screen for methadone at K.’s birth. Further, father failed to take action to protect the child when he knew of Cynthia’s substance abuse. The juvenile court dismissed count (b)(2) alleging father’s history of substance abuse.

When the juvenile court advised father the orders in this case would be the same as the orders in the other case, father responded, “Okay, your honor.”

The juvenile court ordered K. placed with maternal grandmother and directed the Department to monitor the parents’ progress to determine whether K. might be released to Cynthia or father.

### **CONTENTIONS**

Father contends there was insufficient evidence to support a finding of jurisdiction as to father, removal of the children from father’s care was improper and the juvenile court erroneously failed to find father to be a non-custodial, non-offending parent.

### **DISCUSSION**

1. *The jurisdictional findings are supported by substantial evidence.*

a. *Standard of review.*

At a jurisdictional hearing, the juvenile court determines whether the child falls within any of the categories specified in section 300. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1082.) To find jurisdiction under section 300, the juvenile court must determine whether circumstances at the time of the hearing subject the child to the defined risk of harm. (*In re Janet T.* (2001) 93 Cal.App.4th 377, 388; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) Evidence of past events may have a probative value in finding jurisdiction, but only if circumstances existing at the time of the hearing make it likely the child in the future will suffer the same type of serious physical harm or illness as alleged in the petition. (*In re Janet T., supra*, at p. 388; *In re Rocco M., supra*,

at p. 824.) The jurisdictional finding must be supported by a preponderance of the evidence. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 248; § 355, subd. (a).) In reviewing a juvenile court's jurisdictional finding, we apply the substantial evidence test. (*In re David M.* (2005) 134 Cal.App.4th 822, 828; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1649.)

b. *Morgan and Cassidy.*

With respect to Morgan and Cassidy, father contends there is no evidence of any risk of current or future harm related to his behavior. Father notes there are no current domestic violence incidents involving father and no evidence of current drug use. Father claims the evidence showed only that he smelled of alcohol nearly nine months before the Department filed the current petition. Father concedes he missed two drug tests but asserts they were not close in time to the adjudication. Father argues the Department improperly implies it was his fault Morgan and Cassidy lived at a dog grooming parlor. Father notes he did not have custody of the children, did not know of their condition or that Sandra was using drugs. Father claims there is no evidence he contributed to or caused the abuse suffered by Morgan and Cassidy. Father concludes jurisdiction against him is not necessary and the counts against him should be dismissed because he does not pose a current or future risk of harm to the children. (*Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1345-1346; *In re Rocco M., supra*, 1 Cal.App.4th at p. 824.)

The bulk of father's attack on the jurisdictional findings with respect to Morgan and Cassidy is directed at count (b)(3) which alleged father's history of drug and alcohol abuse placed the children at risk of harm. However, the juvenile court dismissed count (b)(3) and declared Morgan and Cassidy dependents based on domestic violence between father and Sandra. Father does not challenge the sufficiency of the evidence to support the domestic violence count which, standing alone, is a sufficient basis upon which to assert juvenile court jurisdiction as to Morgan and Cassidy. (See *In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875-876.)

With respect to father's assertion there was no evidence of a current risk of harm to the children, the juvenile court properly could consider that father was intoxicated at the time of the charged domestic violence incident and that father continued to abuse alcohol as was reported by paternal aunt, the social workers, both mothers, K.'s foster mother and Morgan. Paternal aunt said father and Cynthia stayed with her in October and November of 2008 and in two days drank her entire wine collection. Paternal aunt said drugs and alcohol were more important to father than the children. She said he slept and drank all day.

Father claims paternal aunt's allegations constitute lay opinion, there was no support for her allegations and no evidence the juvenile court gave any weight to the allegations. He complains the evidence does not disclose the size of the wine collection and a two-day incident in October or November of 2005 is not indicative of his current condition.

However, contrary to father's assertion, paternal aunt's statements properly were before the juvenile court. Unless a party raises a timely objection, hearsay statements found in social reports filed in a dependency case constitute admissible, competent evidence that will support a jurisdictional finding. (§ 355, subds. (b), (c)(1); *In re Lucero L.* (2000) 22 Cal.4th 1227, 1242-1244; *In re Cindy L.* (1997) 17 Cal.4th 15, 21-22.) As father did not challenge the hearsay statements before the juvenile court, he has forfeited the hearsay contention on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on another point as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.) Thus, the juvenile court properly could consider paternal aunt's statements when deciding the truth of the allegations.

In any event, there was other evidence that indicated father continued to abuse alcohol. K.'s foster mother reported that father smelled of alcohol on January 2, 2009, when he "popped his head" into foster mother's home during Cynthia's visit with K. Two weeks before the jurisdiction hearing, father failed to appear for a drug test. Thus, at the time of the jurisdiction hearing, the juvenile court had before it evidence of current and continuing alcohol abuse by father. Additionally, father had a history of drug and

alcohol abuse and he failed to comply with the voluntary maintenance plan. In sum, substantial evidence supports the juvenile court's finding father posed a current risk of harm to Morgan and Cassidy based on the sustained allegation of the dependency petition and father's continuing failure to address his alcohol abuse.

c. K.

With respect to K., father contends he did not know Cynthia was using drugs during her pregnancy because Cynthia was participating in a methadone program and she lived with maternal grandmother. Father claims there was no evidence of current alcohol abuse or drug abuse, he tested negative in K.'s case and the juvenile court did not require father to participate in an alcohol or drug treatment program in either case.

Father concludes his three-year-old history of alcohol abuse and Vicodin dependency does not establish a substantial current risk of serious physical harm to K. (*In re David M.*, *supra*, 134 Cal.App.4th at p. 830; *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 789; *Jennifer A. v. Superior Court*, *supra*, 117 Cal.App.4th at p. 1346; *In re Janet T.*, *supra*, 93 Cal.App.4th at pp. 388-389.)

With respect to the assertion father did not know Cynthia was abusing drugs, the evidence showed Cynthia tested positive for heroin on October 15, and November 7, 2008, when she was pregnant with K. and staying with father at paternal aunt's home. Further, on December 3, 2008, Cynthia told a social worker that father was aware of her drug abuse and did not stop her or tell her to quit. On this record, the juvenile court reasonably could conclude father knew Cynthia used illegal drugs during her pregnancy with K. and father failed to protect K. from a substantial risk of harm.

Additionally, this was not the first time a child of father's had been born drug exposed. Cassidy was born drug exposed and the juvenile court found father knew of Sandra's drug use and failed to protect Cassidy. Also, as noted above, the evidence showed father continued to abuse alcohol. Indeed, father's alcohol abuse likely was a contributing factor to his failure to protect K. from Cynthia's drug abuse.

The cases cited by father are distinguishable. None involves a parent with a history of alcohol abuse who continues to abuse alcohol. (*In re David M.*, *supra*, 134 Cal.App.4th 822 [diagnosis of mental illness four years before proceedings and drug use three years previously]; *David B. v. Superior Court*, *supra*, 123 Cal.App.4th at p. 773 [social agency had “minor quibbles” with father’s parenting skills]; *Jennifer A. v. Superior Court*, *supra*, 117 Cal.App.4th 1322 [mother substantially complied with the case plan and there was no evidence her use of marijuana and alcohol adversely affected the child or that mother had a substance abuse problem]; *In re Janet T.*, *supra*, 93 Cal.App.4th 377 [dependency petition did not indicate how mother’s mental health issues created a substantial risk of harm to her children].)

Here, the juvenile court had before it evidence of recent and continuing alcohol abuse by father. Based on father’s history of drug abuse and his continuing abuse of alcohol, the juvenile court could conclude father continued to pose a risk of harm to K. that warranted juvenile court jurisdiction over her.

d. *The failure to declare father a non-custodial, non-offending parent.*

Father claims that, but for the juvenile court’s error in sustaining the allegations related to father, the juvenile court would have found him to be a non-offending parent. As such, father presumptively was entitled to custody of the children. (§ 361.2, subd. (a).)<sup>3</sup>

This claim fails because the juvenile court properly found father to be an offending parent in each case. We therefore need not reach father’s contention that, had the petitions not been sustained, he would have been declared a non-custodial, non-offending parent.

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<sup>3</sup> Section 361.2 provides that when a court assumes jurisdiction of a minor, it must determine “whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child.” If so, the court must place the child with that parent unless it finds that doing so poses a risk of harm to the child. (§ 361.2, subd. (a).)

## *2. Removal of the children.*

Father asserts the removal of the children from his custody was not supported by substantial evidence. Father notes that, at the time of the disposition hearing, he was living with paternal grandmother, he was working as a plumber and had expressed an interest in custody of K. Father asserts there was no evidence he was unable to care for the children or that father posed a risk of harm to the children. (*In re Basilio T.* (1992) 4 Cal.App.4th 155, 171, superseded by statute on another ground as stated in *In re Lucero L., supra*, 22 Cal.4th at pp 1239-1240.) Father further claims the juvenile court could have placed the children in his care while it continued to supervise their progress to assure their protection. (*In re Jeannette S.* (1979) 94 Cal.App.3d 52, 60.) He concludes this is not a case of extreme neglect in which removal of the children from his custody is warranted. Father notes his therapist indicated father was a good parent. Father concludes the juvenile court erred in ordering the children suitably placed.

To support an order removing a child from parental custody, the juvenile court must find clear and convincing evidence that “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.” (§ 361, subd. (c)(1).) Removal findings are reviewed under the substantial evidence test. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

Here, father had only recently stabilized his residence and the therapist’s assessment was made in 2006 in connection with the first dependency proceedings. Since that time, father had failed to comply with the voluntary family maintenance contract, did not cooperate with the Department, did not visit the children and continued to engage in alcohol abuse. This evidence permitted the juvenile court to conclude father had not resolved his history of alcohol and substance abuse. Based thereon, the juvenile court properly could conclude the children remained at risk of harm in father’s care and removal from his care was required for their protection.

3. *No abuse of discretion in the juvenile court's dispositional orders.*

The juvenile court ordered father to participate in drug testing, individual counseling and parenting class in each case. Father argues there was no evidence father was using drugs or alcohol, or that he had any issues that required individual counseling or parenting class. Father claims these orders were not reasonably tailored to remedy the problems that brought the family to the attention of the juvenile court. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006-1007.)

Initially, this claim fails because father did not object when the juvenile court ordered father to participate in these programs. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) In any event, the orders were well within the discretion of the juvenile court. The evidence before the juvenile court indicated father had a history of substance and alcohol abuse and a current alcohol abuse problem.

**DISPOSITION**

The orders of the juvenile court are affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.